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October Term, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON, EDWARD C. SCHMULTS, and CAROL E. DINKINS,
Appellees.

On Appeal From the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF WHITNEY NORTH SEYMOUR, JR., INDEPENDENT COUNSEL (IN U.S. V. DEAVER) IN SUPPORT OF APPELLANT ALEXIA MORRISON, INDEPENDENT COUNSEL

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INTEREST OF AMICUS CURIAE [1]

This brief is submitted to provide the Court with additional information and insights on the workings of the Independent Counsel statute based on the experience of an Independent Counsel who has actually completed an investigation and prosecution under the statute. The interest of Independent Counsel Whitney North Seymour, Jr., in this case arises from the fact that he was appointed Independent Counsel on May 29, 1986,

[1] All parties have consented to the filing of this brief *amicus curiae* in support of appellant Alexia Morrison, Independent Counsel. Copies of these written consents have been filed with the Clerk.

pursuant to 28 U.S.C. §592(c)(1), for purposes of investigating, and, if warranted, prosecuting Michael K. Deaver, former White House Deputy Chief of Staff and Assistant to the President of the United States. This appointment was made in response to widespread public concern over whether Mr. Deaver's conduct, following his departure from the White House to found a Washington, D.C. lobbying firm, violated the Ethics in Government Act, 18 U.S.C. §207.

This concern led five members of the United States Senate to write to the Attorney General, on April 23, 1986, requesting the appointment of an independent counsel. 28 U.S.C. §595(e). Two days later, on April 25, 1986, the Office of Government Ethics wrote the Attorney General advising him that its own investigation suggested that Deaver had violated the law. On May 10, 1986, the Government Accounting Office expressed its belief that Deaver's activities might have been unlawful. On April 28, 1986, through his counsel, Deaver himself requested the Attorney General to appoint independent counsel.

On May 22, 1986, pursuant to 28 U.S.C. §592(c)(1), Deputy Attorney General D. Lowell Jensen moved a Division of the United States Court of Appeals for the District of Columbia Circuit for the appointment of an independent counsel in the Deaver matter. The application was submitted by the Deputy Attorney General because the Attorney General had recused himself from the matter. *See* 28 U.S.C. §591(c). The application set forth the recommended subject matter of Independent Counsel's jurisdiction, and on May 29, 1986, the Special Division appointed Whitney North Seymour, Jr., as Independent Counsel in an order conferring upon him jurisdiction tracking the Deputy Attorney General's request.[2]

[2]In March 1987, after grand jury testimony had been completed, and virtually on the eve of indictment, Independent Counsel was offered a "parallel appointment" as a Justice Department employee. *See* 52 Fed. Reg. 7270 (1987). The offer was not accepted.

Following an unsuccessful pre-indictment challenge by Deaver to the constitutionality of the independent counsel statute,[3] the grand jury returned an indictment on March 18, 1987, in five counts, which charged Deaver with perjury, in violation of 18 U.S.C. §§1621, 1623.[4]

Trial of this indictment commenced before the Honorable Thomas Penfield Jackson, United States District Judge, and a jury on October 19, 1987. On December 16, 1987, the jury returned a verdict of guilt on three counts of the indictment, and acquitted Deaver on two counts.

While awaiting sentencing, which was scheduled for February 25, 1988, a panel of the United States Court of Appeals for the District of Columbia Circuit held the independent counsel provisions of the Ethics in Government act unconstitutional. *In Re: Sealed Case*, Misc. Nos. 87-5261, 87-5264 and 87-5265 (D.C. Cir. January 22, 1988).

On the authority of that decision, on January 22, 1988, Deaver moved in the District Court to vacate the verdicts of guilt and for dismissal of his conviction. Independent Counsel opposed the motion, and on February 2, 1988, *sua sponte*, Judge Jackson stayed all proceedings in the case pending review of the *In Re: Sealed Case* decision.

[3]*Deaver v. Seymour*, 656 F. Supp. 900 (D.D.C 1987), *aff'd*, 822 F.2d 66 (D.C. Cir. 1987), *stay denied*, 55 U.S.L.W. §641 (U.S. March 18, 1987).

[4]Three counts of the indictment alleged that Deaver perjured himself during his voluntary appearance before the grand jury. Two counts alleged that Deaver committed perjury when he testified on May 16, 1986, before the Subcommittee on Oversight and Investigations of the House Committee on Commerce and Energy. On August 12, 1986, pursuant to a unanimous determination of the Subcommittee, its chairman, Rep. John D. Dingell, referred to Independent Counsel the question whether Deaver had committed perjury before the subcommittee.

Independent Counsel Seymour submits this brief in order to emphasize the urgency of the resolution of the constitutionality of the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§49, 591-98, heightened by the current posture of the Deaver case in the District Court. A jury verdict of guilt has been returned; no sentence has been imposed; no judgment of conviction has been entered; and all proceedings are at a standstill.

Second, this brief is submitted to enhance the completeness of the defense of the challenged statute.

Third, this brief responds to the erroneous statements contained in the panel decision concerning the operation and functions of an independent counsel pursuant to the Ethics in Government Act.

SUMMARY OF ARGUMENT

The independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§49(a), 591-98, are consistent with the principle of separated powers, and a constitutional response to the problem of executive branch conflict of interest. The necessity of a mechanism for providing a genuinely independent capacity for investigation and prosecution, when a conflict of interest disables the Justice Department from performing its customary role, is reflected in the record of the investigation and trial of *United States v. Deaver*, Crim. No. 87-0096 (D.C.D.C. 1987).

Furthermore, an examination of the record of the actual operation of an independent counsel reveals that the purported constitutional defects in the statute are more imagined than real. Specifically, the statute does not usurp the Attorney General's substantial control over the decision whether to prosecute. Nor

does reliance on judicial appointment of independent counsel depart from the historic relationship between the judicial and prosecutive functions. Finally, the independent counsel does not threaten individual liberty.

ARGUMENT

POINT ONE

AS EVENTS SURROUNDING THE INVESTIGATION AND PROSECUTION IN UNITED STATES V. DEAVER DEMONSTRATE, THE INDEPENDENT COUNSEL STATUTE IS A RESTRAINED AND CONSTITUTIONALLY CORRECT RESPONSE TO THE PROBLEM OF CONFLICT OF INTEREST IN THE EXECUTIVE BRANCH

The independent counsel provisions arose from a legislative determination, following "Watergate," that there was a critical "need for a special prosecutor to handle cases *where the Attorney General has a conflict of interest.*" H.R. Rep. No. 1307, 95th Cong., 2d Sess. (1978) (emphasis supplied).

The conflict of interest issue is not merely theoretical. In the Deaver matter, the application for appointment of Independent Counsel was submitted to the Special Division by the Deputy Attorney General expressly because the Attorney General, a longtime colleague and friend of the defendant, had recused himself. When Deaver's indictment was announced, the President of the United States publicly stated he and Mrs. Reagan "wish[ed] [Deaver] well." (*Time*, 3/30/87, p. 23) When the jury returned its verdicts, the President released a statement that he was "sorry to learn of the jury's decision." (*Washington Post*, 12/17/87, p. 1 col. 1) Both statements could have aroused public concern over the commitment of the executive branch to the enforcement of the criminal law in this

case, were it not for the fact that investigation and prosecution were entrusted to an Independent Counsel.[5]

The "need for a Special Prosecutor to handle cases where the Attorney General has a conflict of interest," as found by Congress in its passage of the Ethics in Government Act, arises not because of the proposition that "Presidents can no longer be trusted to ensure that their senior appointees obey the criminal laws," (Slip Op. at 60) as the Court of Appeals majority opinion characterized the issue, but rather because of the perceived need for public confidence in the administration of the laws, and the need to avoid actual and apparent conflicts of interest.[6] This is especially important in the enforcement

[5]It is not hard to imagine the genuine concerns of career Department of Justice employees assigned to investigate Deaver's conduct in the face of such expressions of personal friendship for the target of the investigation. Compare President Grant's efforts to block the investigation and prosecution of his personal aide and friend in the Whiskey Ring scandal a century before. (See Appendix at 7a-9a.)

[6]This is exactly the reason why the President and Attorney General of a prior Administration strongly supported the independent counsel bill and (in direct contrast to the present Administration) espoused its constitutionality. Said the representative of the Department of Justice to the Ribicoff Committee in 1977 (Asst. A.G. John Harmon, Office of Legal Counsel):

> In view of the departure which this bill takes with respect to the normal methods of appointing and removing Executive officials, I shall briefly state our views as to the constitutionality of the measures here. We believe that judicial appointment is justified by the Appointments Clause, Article II, section 2, and the extraordinary circumstances which would mandate a recourse to a special prosecutor. It is our view that ordinarily Article II, section 2 cannot be used to override the fundamental principle of the separation of powers; this principle would generally require that the Executive be allowed to appoint those officials carrying out Executive functions. ***However, the circumstances surrounding misconduct by high-level officials and the need to preserve the appearance of justice would warrant a judicial appointment here.*** In such exceptional circumstances

of laws governing persons holding high public office, particularly when those officeholders, or former officeholders, are close personal friends or colleagues of those in power.

The "core function" of the Independent Counsel in the Deaver case was to investigate the interaction between Deaver and his former executive branch colleagues, both when Deaver served in the White House and after, when he remained a close personal friend and confidant of the President and Mrs. Reagan. By its very assignment, the focus of the investigation was on the nature and substance of communications between Deaver and executive branch officials, and information about many of those communications could be obtained only by questioning — sometimes less than friendly questioning — of sitting officials.

Witnesses and potential witnesses in the Deaver case included Attorney General Meese, Secretary of State Shultz, former Chief of Staff Regan, United States Trade Representative Yeutter, Secretary of Treasury Baker, former Secretary of Transportation Dole, former White House Counsel Fielding, present and former Ambassadors, former National Security Council advisors, and the President himself, as well as countless Deputy Secretaries and personal friends.[7] Perhaps even more important, many of the witnesses who had to be questioned in order

> we do not believe that an "incongruous" duty would be imposed upon the courts. *See* Ex parte Siebold, 100 U.S. 371, 398 (1879).
>
> The extraordinary circumstances inherent in the need for resort to a special prosecutor would also justify the restrictions placed on the Executive's power of removal in this instance.

Hearings before the Committee on Governmental Affairs, U.S. Senate, 95th Cong., 1st Sess. on S.555 (May 3, 1977) (at p.16) (emphasis supplied.)

[7]Over twenty present or former executive branch officials and employees were called as trial witnesses.

to carry out the investigation also included a number of lower-level executive branch employees, including secretaries, photographers, and security guards, some of them with eyewitness testimony relating to their current superiors or colleagues. To the extent that any of these witnesses were willing to give information harmful to the President's friend, who can say that they would have been as willing if the investigator seeking the information had been another executive branch insider?

Issues investigated in the Deaver case involved Presidential decisions on appointment of and contacts with a special envoy in connection with the Canadian-U.S. "acid rain" issue, White House involvement in retention of an important tax code provision for companies investing in the Caribbean, insertion of remarks into Presidential and Vice Presidential statements, Presidential involvement in key foreign trade issues, efforts to influence the executive branch on economic protectionism and foreign policy, and Presidential involvement in decisions over space station funding and selection of a supplier for a new Air Force One, the President's plane.

A main theme of the defense was that the defendant had never traded on his special relationship with the President. Independent Counsel's case depended in great part on the ability to prove otherwise, by showing Deaver-Reagan contacts through a variety of means and leads, not all of them calculated to be popular at the White House. Even if these matters could have been investigated effectively by the Administration in power, could such an investigation ever have quelled the doubts over whether personal or political influence had been brought to bear on the investigation?

The necessity of genuinely independent counsel to investigate and prosecute when conflicts of interest arise is also demonstrated by an examination of the conduct of the Deaver trial.

Four incidents that occurred during pretrial and trial proceedings in the Deaver case illustrate the necessity of an office of independent counsel, and the appropriateness of the independence guaranteed by the Ethics in Government Act, to provide assurance to the public that the laws of the land are being faithfully executed. Only one of these episodes is even referred to in the majority opinion, which is based on a very narrow factual record arising out of a contempt proceeding in connection with a grand jury subpoena.

A. The Subpoena to the Canadian Ambassador

That incident, the first to be discussed here, is even referred to inaccurately in the opinion by the panel majority below. The majority opinion cited our office's "attempt to subpoena the Canadian Ambassador in the face of strenuous opposition by the Department of State on this delicate diplomatic question" (Slip Op. at 57) as troubling evidence of the danger of lack of executive branch supervisory authority over the Independent Counsel. In fact, the record shows that our office had initially contacted the Canadians through diplomatic channels, had obtained information by Canadian government cooperation that had contributed to a portion of the indictment against Deaver, and had been communicating for months without opposition from the State Department on a lawyer-to-lawyer basis as directed by the Canadian government.

The "attempt to subpoena" referred to by the majority consisted of an effort to determine if the Ambassador would voluntarily accept a subpoena. When the position of the Canadian government changed from cooperation to resistance, there remained the issue of whether the prior cooperation constituted a waiver of diplomatic immunity, which we put to the court to decide. The State Department opposed the Independent Counsel's argument to the Court that a waiver had occurred

and the Court ruled in favor of the State Department's position. Plainly, the issue of waiver was for the *court*, not the *executive* to decide. *National Bank v. Republic of China*, 348 U.S. 356, 358 (1955). We submit this incident reflects a proper working of the system of checks and balances — not an aberration.

B. Relations With Executive Agencies Over Classified Documents

During the Independent Counsel's preparation for trial, the Office obtained and reviewed classified documents from a variety of sources within the Administration, including the National Security Council, State Department and intelligence agencies. The Office also represented the interests of the White House and other agencies in negotiations over Deaver's document declassification requests and the Classified Information Procedures Act, where those agencies' interests were consistent with those of the Office of Independent Counsel. Where they were not, the agency or the Department of Justice furnished its own counsel.

These executive agencies sometimes had strong institutional interests not to declassify certain documents. The Office of Independent Counsel sometimes had a strong institutional interest to have these documents declassified — both to use them affirmatively and also to block "graymail," the defense claim that declassification was required in order to obtain a fair trial. Arms-length negotiations were held with each of the respective agencies.

The final result of this process was effective cooperation, no leaks and no complaints. In fact, the Office of Independent Counsel declined to challenge one agency's refusal to declassify two key documents that related directly to an important issue

in the case. Suppose that decision had been made by counsel that did not have independence? What would the public perception be of whether a responsible decision had been made?

C. The Trial Examination of Government Officials

The third incident involved the redirect examination at trial of the Secretary of State, a self-described friend of Deaver, who had been called as a prosecution witness to testify to his contacts with the defendant. On cross-examination, Deaver's lawyer elicited what amounted to opinion testimony of the defendant's character. Because of the independence afforded by the Act, Independent Counsel was able to function properly as a trial lawyer uninhibited by political restraints, and to cross-examine Secretary Schultz freely and vigorously on a range of subjects without fear of effective retribution within the Administration.[8] (Tr. 2198-2201)

A look at the results illustrates the wisdom of the Act. Suppose the prosecutor had made a perfectly appropriate tactical decision not to cross-examine Shultz. Would the public have been confident that the decision had been made for sound tactical reasons and not as an improper exercise of power? On the other hand, without that cross-examination, would the jury have been able to disregard Shultz's character testimony, as it did?

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[8]Counsel was able to do this despite a political atmosphere reflected in remarks to the press by "White House spokesman," Marlin Fitzwater, presumably on behalf of the executive branch. Fitzwater was quoted as telling the press: "I find it outrageous that he [Seymour] would find it wrong for one friend to feel sorry for the hardships of another and he is totally out of line." (*Washington Post*, December 19, 1987, p. A3, col. 3)

D. The Question of Presidential Testimony

The fourth incident is referred to in a bench conference during trial (Tr. 2881-2; 2978-81). One hotly disputed issue at trial was whether Deaver, while he was a private citizen, had obtained a personal letter of introduction from President Reagan to President Chun of Korea, in part to ensure that Deaver could get in to see President Chun on behalf of a private client, and on behalf of his own client development efforts.[9] The American Ambassador to Korea testified that he had been with Deaver when he presented such a letter to President Chun, but defense counsel suggested the Ambassador was sick and confused. (Tr. 2754, 2796-2800)

The issue of whether Deaver had obtained a letter from President Reagan in furtherance of these private efforts led defense counsel to ask the Court for production of the Independent Counsel's notes of his interview with President Reagan as *Brady* material.[10] In response to the request, the trial judge reviewed the Independent Counsel's notes *in camera*, and found that the notes, which it kept under seal, indeed related to the letter described by Ambassador Walker. The Court denied the request for disclosure, however, advising Deaver's counsel, the notes were "not exculpatory of your client." (Tr. 2979) When Deaver's counsel inquired whether the notes showed if the President had indicated such a letter existed,

[9]At the time, Deaver was simultaneously soliciting the Korean government as a client so he could lobby the American government on its behalf, as well as lobbying the Korean government on tobacco issues on behalf of an American client, Philip Morris. (Tr. 814-851)

[10]The White House denied that it had a copy of the letter, and the Korean government blocked inquiry by invoking diplomatic immunity. (Tr. 2797) It should be noted that State Department channels were used to explore the Korean government's position, and unlike the Canadian matter, no public dispute between State and Independent Counsel occurred, nor did any issue arise which required a ruling by the Court.

the Court stated, "The answer is unfavorable to you." (Tr. 2980).

Two points are illustrated by this incident. First, as should be apparent even to critics of the institution of the Office of Independent Counsel, at least some restraint must have been employed in the Independent Counsel's choice of trial witnesses, even by an officer who was not in fear of instant removal by the President or Attorney General. Second, suppose a non-independent counsel subject to instant removal had made a decision not to call the President as a witness. Would the public be assured that justice had been fairly administered?

We submit that this and the other incidents above are classic examples of a trial lawyer on the firing line enjoying the requisite freedom to exercise his best judgment on behalf of his client. Here counsel was allowed to make independent decisions on important questions of trial strategy without jeopardizing public confidence in the effectiveness of the administration of justice.

Finally, in addition to the need for independence in deciding what steps to take in the day-to-day decisions involved in investigating and presenting a case to the Court, there is a need for independence in deciding what steps *not* to take. Only if those decisions not to do certain things are made by an office untouched by questions of conflict of interest will the public trust be won. Contrary to the analysis in the panel majority's opinion, the success of the Office of Independent Counsel does not turn on whether it returns indictments or achieves convictions (Slip Op. 70-71), but on whether or not the office is perceived to be doing its job properly, whatever the facts happen to be.

POINT TWO

AS THE ACTUAL EXPERIENCE IN UNITED STATES V. DEAVER PLAINLY SHOWS, THE STATUTE IS NEITHER AN UNCONSTITUTIONAL INVASION OF THE EXECUTIVE POWER OVER PROSECUTORIAL DECISION-MAKING NOR A THREAT TO INDIVIDUAL LIBERTY.

The panel majority held that the independent counsel statute "as a whole . . . so deeply invades the President's executive prerogatives and responsibilities and so jeopardizes individual liberty as to be unconstitutional." (Slip Op. 74). This erroneous conclusion is based on a misunderstanding of the relationship between the judicial and prosecutive functions, as well as on mistaken speculation about the actual functioning of an independent counsel.

A. The Attorney General Retains Substantial Control Over The Decision To Prosecute.

Under the Independent Counsel statute, it is the Attorney General who makes the *policy* decision whether a prosecution should take place (if supported by the facts) at the time he decides to file his application with the Special Division (28 U.S.C. §592(b)(1)).[11] If he decides for policy reasons that he

[11]By "policy decision," we refer to the "legitimate exercise of discretion and the [Justice] Department's established policies of law enforcement," which the statute contemplates will influence this decision. S. Rep. No. 496, 97th Cong., 2d Sess. 14 (1982), p. 17.

In the Deaver matter, the application by the Deputy Attorney General expressly directed the Independent Counsel to prosecute any federal law violations supported by the evidence.

> It is recommended that the independent counsel's jurisdiction include ***investigative and prosecutive authority*** over the specific allegations described in Part II above. In addition, it is recommended that the independent counsel's jurisdiction include ***investigative and prosecutive authority*** over all other allegations presented in the three referrals, and over any related matters developed in the course of the independent counsel's investigation.

(Appl. p.6-7) (emphasis supplied).

will not authorize such a prosecution, his option is not to file any application with the Special Division and then explain his reasons to the community. Under the statute, that decision is unreviewable. *Id. See also Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986); *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984) (en banc); *Nathan v. Smith*, 737 F.2d 1069, 1077-82 (D.C. Cir. 1984) (Bork, J., concurring). In that respect, his policy-making function is no different than it would be if he delegated only investigative responsibility to independent counsel, and reserved decision on whether to authorize prosecution until the investigation had been completed.[12]

The Independent Counsel's function as far as prosecution is concerned could be described as essentially a ministerial one: to review the legally admissible evidence to determine if it will support a conviction beyond a reasonable doubt, and, if so, to proceed, if prosecution is consistent with the relevant Justice Department guidelines. The statute expressly directs the Independent Counsel to follow the Department of Justice guidelines in performing this and other functions. 28 U.S.C. §594(b). He is not permitted to operate capriciously or arbitrarily on his own. (Contrast Slip Op. at p. 72.)[13]

[12]When the Department of Justice refers cases to individual United States Attorneys for investigation and prosecution, the policy question of whether to prosecute if the facts warrant is made at that point. The U.S. Attorney ordinarily does not report back for further instructions after completion of the investigation.

[13]The United States Department of Justice's "Principles of Federal Prosecution" are printed in booklet form and available to the public. In the Deaver matter, copies were made available to every member of the legal staff in the early stages of the investigation.

The majority opinion erroneously asserts that under the statute the Attorney General has no effective power "to define, circumscribe, or supervise" the duties of the Independent Counsel. (Slip Op. 19.) For all practical purposes, the statutory directive to follow Departmental policies gives the Attorney General exactly the same power over the execution of the duties of the Independent Counsel that he has over every other prosecutor in the Department. The Attorney General sets the ground rules, and the prosecutors carry them out.[14] When the Attorney General asks the Special Division to appoint Independent Counsel to *prosecute*, he delegates sufficient discretion (within the Department's guidelines) to permit the Independent Counsel to carry out his assigned duties. He does not yield up the policy decision on *whether to prosecute* if sufficient evidence is developed — that decision is made when the Attorney General decides to file the application for appointment of Independent Counsel, because at that point he has made the statutory determination that "further investigation or prosecution is warranted." 28 U.S.C. §592(c).[15] Plainly,

[14]Decisions as to whether to recommend two counts or ten in an indictment; when and whether to call witnesses; whether to object to particular questions by defense counsel are only "ministerial and mechanical" functions insofar as they affect the operations of the Department of Justice. (See Slip Op. at p.50.)

[15]This is no theoretical matter. At the time of the original hearings on the legislation, the Department of Justice summarized its experience in evaluating allegations against public officials and concluded that some 75-80% of such allegations would not warrant the appointment of a special prosecutor:

> By our best estimate, about 37 allegations received against individuals during the past year would come under the jurisdiction of the Special Prosecutor as that jurisdiction is established in S.555. Of these 37 allegations, 16 were so patently lacking in support that they were disposed of without preliminary investigation. Another 12 allegations were disposed of after preliminary investigatory work taking less than 60 days to complete. The remaining 9 allegations required more than 60 days to investigate. Of the 37 allegations, we think that the 28 that were disposed of within 60 days would not have warranted the appointment of a special prosecutor.

Hearings before the Committee on Governmental Affairs, United States Senate, 95th Cong., 1st Sess. on S.555 (May 3, 1977) (at p. 9).

the policy-making phase is long past at the point the indictment is filed by the appointee carrying out the Attorney General's original decision. What remains is merely the faithful discharge of an assigned duty.

While it is true that once appointed, independent counsel operates without day-to-day supervision of the Attorney General, the panel majority misunderstands our legal history when it asserts that the principle of separated powers cannot tolerate a federal prosecutor's limited independence from the Attorney General.[16] The Judiciary Act of 1789, Ch. 20, 1 Stat. 73, provided for the appointment of both the Attorney General and an attorney in each federal district "to prosecute . . . all delinquents for federal crimes and offenses." The Attorney General, however, *"had no formal control* over the conduct of the local federal law enforcement officers." *3 Encyclopedia*

[16]For a discussion of relevant historical sources, *see* the Appendix to this brief. Of course, the "critical factor" limiting independent counsel's independence is, as this Court acknowledged in *Bowsher v. Synar*, 106 S. Ct. at 3188, the power to remove, which remains with the Attorney General. Inexplicably, the panel majority concluded that "in practical terms," the independent counsel's superior is the Special Division. This is simply a false and unsupported assertion. The "practical terms" of the functioning of this amicus as Independent Counsel has involved *no judicial supervision or interference whatsoever.*

The reference at footnotes 59 and 60 of the majority's opinion to the Special Division clarifying orders concerning staff appointments is incomplete and misleading. What was involved was a cloud cast upon the ability of Independent Counsel to select qualified associate counsel — a matter involving the Special Division's appointive authority, and having nothing to do with "the day-to-day activities" of Independent Counsel in the conduct of substantive investigative or prosecutive responsibilities.

of Crime and Justice 1291 (S. Kadish, ed. 1983) (emphasis supplied). Although proposals to give the Attorney General authority over "federal district attorneys," as they were then known, were introduced in Congress as early as 1791, legislation to achieve this objective was not enacted for another seventy years or more. Hence, "it was not until after Reconstruction and the creation of the Department of Justice in 1870 that the various prosecutors came under any meaningful national supervision." *Id. See generally* Cummings & McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive* (1937); Huston, *The Department of Justice* (1967); Schwartz, "Federal Criminal Jurisdiction and Prosecutor's Discretion," 13 *Law & Contemporary Problems* 64-87 (1948).[17]

[17]Although the Constitution makes no specific reference to the nature or organization of prosecutorial powers, more general writings on the executive and the doctrine of the separation of powers cast some light on the Framers' intent. While Madison in *Fed.* 48 noted the tendency of the legislature to absorb the other departments, the Federalists did not ignore the threat from the executive. Hamilton in *Fed.* 69 meticulously contrasts the proposed executive with the King of Great Britain in an attempt to assure his audience that history will not repeat itself. While overall, the Federalists appeared more fearful of legislative usurpation, this may simply have reflected their belief that Article II had incorporated sufficient limitations and safeguards against executive encroachment. Madison in *Fed.*48 describes "the executive power being restrained within a narrower compass, and being more simple in its nature." *Fed.* 48 at 334. Moreover, while Hamilton in *Fed.* 70 stresses the need for unity in the executive, his justification for this is to ensure responsibility and accountability — the objective behind the office of independent counsel.

The Federalist Papers nevertheless help a proper understanding of the doctine of the separation of powers. Drawing on Montesquieu, Madison in *Fed.* 48 explained that the doctrine, "does not require that the legislature, executive, and judiciary departments should be wholly unconnected with each other." In fact, he contended, "that unless these departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." Equally important as the Federalists' explanation of the mechanics of the separation of powers is their revelation of the objective of this doctrine. Reflecting the theory of mixed government still prevalent in many state governments at that time, the Federalists were less concerned with maintaining the functional purity of the branches than they were with preventing the ascendancy of a single branch, with its resulting tyranny.

Viewed against this historical backdrop, the Attorney General actually exercises *greater* control over independent counsel, by virtue of his power over appointment, removal and the definition of jurisdiction, than attorneys general exercised over federal prosecutors for the first half of our republic's history. It is therefore difficult to accept the panel majority's view that the principle of separated powers cannot tolerate independent counsel's limited freedom from direct control by the Attorney General, when the Framers tolerated a far greater degree of such independence.[18]

B. Judicial Appointment Of Prosecutors Is Compatible With The Separation of Powers

The majority opinion's conclusion that judicial appointment of independent counsel is incompatible with the structure of our government ignores the substantial evidence to the contrary from numerous state jurisdictions.

[18]An examination of the present-day relationship actually prevailing between the Attorney General and the United States Attorneys throughout the country similarly reveals considerable independence. "Whether because of history, the selection process, or sheer volume of business, the *United States Attorney's daily operations remain largely free of control* by officials in Washington, D.C.... Although the department may announce broad priorities for federal law enforcement, each *United States Attorney ultimately makes his own decisions* about which cases to pursue and the resources to be allocated to particular enforcement efforts." *3 Encyclopedia of Crime and Justice, supra,* at 1292 (emphasis supplied). *See also Principles of Federal Prosecution,* at 8 (Department of Justice 1980) ("Individual United States Attorneys may establish their own priorities, within the national priorities, in order to concentrate their resources on problems of particular local or regional significance.")

As the Appendix to this brief sets out in greater detail, state courts have traditionally been authorized by statute to appoint special prosecutors in many states, and the courts in other state jurisdictions have long insisted, even in the absence of statutory authority, that they have inherent power to appoint *pro tem* prosecutors. (See Appendix at 14a-15a, *citing* testimony at Hearings on S. 2803 and S. 2978 before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 93d Cong., 2d Sess. 351, 352, 362 (1974).

When this judicial power has been challenged, it has routinely been upheld. In the State of Connecticut, for instance, "the system of judicial appointment of the state's attorney has functioned effectively for nearly 270 years. . . ". *State v. Moynahan*, 164 Conn. 560, 325 A.2d 199 (1973) ("the practice has prevailed [since 1704] to the present time without interruption and, until recently without disputation"). In language which marks a sharp break from the panel majority's view that judicial and prosecutive functions cannot constitutionally intersect, the Connecticut Supreme Court has written,

> *The functions of a state's attorney are not purely those of an executive officer.* As a representative of the people of the state, he is under a duty not solely to obtain convictions but, more importantly, (1) to determine that there is reasonable ground to proceed with a criminal charge; State v. Hayes, 127 Conn. 543, 581, 18 A.2d 895; (2) to see that impartial justice is done the guilty as well as the innocent; and (3) to ensure that all evidence tending to aid in the ascertaining of the truth be laid before the court, whether it be consistent with the contention of the prosecution that the accused is guilty. State v. Harris, 147 Conn. 589, 598, 164 A.2d 399; State v. Zimnaruk, 128 Conn. 124, 127, 20 A.2d 613.

> The state's attorney, thus, is an officer charged with important duties and responsibilities in the administration of justice. *Such duties* of a state's attorney *are entirely consistent with judicial power* as prescribed by our constitution. State v. Hayes, supra.

Id. at 206 (emphasis supplied).

Moreover, it is not uncommon for state court judges to exercise prosecutive powers through one-man grand juries, which typically involve state court judges who take on investigative responsibilities. *See, e.g.*, Wis. Stat. §968.26; Mich. Comp. L. §767.3. In *In re Oliver*, 333 U.S. 257, 261, n. 4 (1948), this Court acknowledged the fact that similar statutes existed, and were in use, in at least ten states, and that under such a scheme, the "judge-grand jury is authorized to appoint its own prosecutors, detectives and aides at public expense . . ." *Id.* at 263, *citing In re Investigation of Recount*, 270 Mich. 328, 331, 258 N.W. 776, 777 (1935). There is not a hint in the Court's opinion in *In re Oliver* that the judicial exercise of investigative functions, and of the power to appoint prosecutors, offends the principle of separated powers.[19]

These statutes have been been repeatedly found by the state courts to be consistent with traditional understandings of the separation of powers, and the need to avoid the assignment of non-judicial power to the courts. *See, e.g., In re Slattery*, 310 Mich. 458, 17 N.W.2d 251 (1945); *State v. Washington*, 83 Wis.2d 808, 266 N.W.2d 597 (1978).

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[19] *In re Oliver* involved a witness who had been convicted of contempt for false and evasive testimony before a one-man grand jury. The Court reversed the conviction on the ground that the summary nature of the adjudication of contempt lacked adequate procedural safeguards.

Accordingly, the panel majority actually seeks to dismantle, rather than uphold, the historical understanding of the proper relationship between the judicial and prosecutive function when it insists on a rigid compartmentalization of these responsibilities. Since judicial appointment of special prosecutors, and judicial exercise of investigative power, has been common in this country, both before and after adoption of the Constitution, the contention that any such arrangement is incompatible with the very structure of our governmental system finds no support in the historical record.

C. The Independent Counsel's Limited Independence Does Not Jeopardize Individual Liberty

According to the panel majority, the independent counsel's "independence from presidential and Justice Department supervision and guidance" unconstitutionally jeopardizes individual liberty. (Slip Op. 70, 74). The threat to liberty, according to the panel majority, stems from two sources: (1) independent counsel's purportedly "unique incentives to seek an indictment," rather than decline prosecution, and (2) independent counsel's purported isolation from the "accumulated lore and wisdom" of career Justice Department prosecutors, which, it is argued, ordinarily operate as restraints on the decision to prosecute. (Slip Op. 70-72). Neither of these purported sources of unfairness are more than an imagined threat to liberty, much less a source of constitutional infirmity.

The record of past independent counsels simply refutes the panel majority's fear that independent counsel is preconditioned to prosecute. Until the Deaver investigation, every prior independent counsel terminated his investigation with a declination of prosecution, on grounds of evidentiary weakness or

otherwise.[20] Contrary to the panel majority's speculation that the nature of prosecutorial decision-making in a high-visibility, single case context intolerably encourages prosecution, the opposite of this conclusion is much more likely to be the case. A prosecutor who "administer[s] the criminal law across a wide population" is in a much better position to go forward in a marginal case, or one involving evidentiary or other weaknesses, precisely because "the success of the office" will not be measured by that one case. (Slip Op. 70-71). Independent counsel, on the other hand, is a prosecutor whose mission is often "to investigate and perhaps prosecute a single individual." *Id.* Since the effectiveness of the counsel's "office itself, in the public's eyes, at least, must turn to some extent upon whether indictment and conviction are obtained," *id.*, there is actually a disincentive to going forward in all but the clearest, most certain cases. In other words, the high-visibility, single case context instills caution, even reluctance, rather than the undue eagerness suggested by the panel majority.

Secondly, the panel majority's assumption that independent counsel is isolated from the reservoir of practical experience and long-range institutional perspective of the Justice Department is simply false. The majority opinion asserts that in performing his prosecutive functions, and particularly in exercising prosecutorial discretion, an independent counsel does not have "access to officials who are participants in the ongoing process of enforcing the law. . ." (Slip Op. 72). However, this statement wholly disregards the express authorization in

[20]Four distinguished attorneys (Arthur H. Christy, Gerald J. Gallinghouse, Leon Silverman, and Jacob A. Stein) served as Independent Counsel prior to the appointment in the instant case of James C. McKay, and, upon his withdrawal due to potential conflict, Alexia Morrison. Each of the prior investigations resulted in a decision not to go forward with a criminal prosecution.

the statute to request such assistance both from the United States Attorney and the Department of Justice.[21] It also disregards the fact that most Independent Counsel and their staffs have had extensive prosecutive experience in the Department of Justice, and that in actual practice Independent Counsel regularly do confer with staff members in the Department (as was done extensively in the *Deaver* case) and vice versa.

Finally, it is difficult to perceive the unconstitutional unfairness that inures to persons "who find themselves the target of independent counsel's attention," (Slip Op. 70) [22] since such persons are protected by all of the constitutional and statutory limits on the power to investigate and prosecute that apply in any criminal case.

In sum, the panel majority's conclusion that the functioning

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[21]The relevant language appears in 28 U.S.C. § 594:

> Such investigative and prosecutorial functions and powers shall include — ...
>
> (10) ***consulting with*** the United States Attorney for the district in which the violation was alleged to have occurred.
>
> • • •
>
> (d) A[n] independent counsel ***may request assistance*** from the Department of Justice, and the Department of Justice ***shall provide that assistance***, which may include access to any records, files, or other materials relevant to matters within such independent counsel's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such independent counsel's duties.

(emphasis supplied.)

[22]We cannot help but note in passing that this does not apply to Deaver, who urged the appointment of independent counsel and voluntarily testified before the grand jury, where he perjured himself, as a trial jury has found beyond reasonable doubt.

of an independent counsel unconstitutionally threatens individual liberty is unpersuasive.[23]

CONCLUSION

For all of the foregoing reasons, appellant's appeal should be granted and the panel decision should be vacated.

Respectfully submitted,

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[23]Even if the "incentive to prosecute" or isolation from restraining institutional influences existed, which we submit they do not, these purported deficiencies in the statutory scheme might indicate its undesirability as policy; they would hardly rise to the level of a constitutional defect that would deprive Congress of its lawful power to enact the legislation.

APPENDIX

THE ROLE OF THE SPECIAL PROSECUTOR IN AMERICAN HISTORY[1]

The investigation and prosecution of alleged corruption in high places — whether that of venality or of abuse of power — has been a function to which all three branches have contributed throughout American history — often aided by the employment of independent counsel from outside the government. This appendix attempts to demonstrate the historical evidence that, under the American constitutional system, legislators, grand jurors, executive officials and special counsel have found it to be within the definition of their functions to expose bribery, graft, extortion and willful maladministration of government. Prior to that discussion, however, some consideration of the British experience might be helpful.

The British Experience

So different are British and American governance where separation of powers is concerned,[2] that one may easily argue that the British experience with the investigation and prosecu-

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[1]This appendix was prepared by Jeffrey Brandon Morris, Assistant Professor of Political Science, University of Pennsylvania, and Member of the Bar of the Supreme Court of the United States, at the request of Whitney North Seymour, Jr., Independent Counsel.

The author acknowledges the assistance of the following persons in connection with this study: Robert B. Wasserman, Rachel J. Dickstein, Jennifer D. Forstner, Jonathan R. Galst and John A. Grossman of the University of Pennsylvania; Stephanie A.J. Dangel, Tamar Benamy and Anne F. Jacobs; Professor Nancy Kassop, State University of New York at New Paltz.

[2]Compare, however, Madison's discussion of the similarities of the separation of powers notions in Federalist No. 47.

tion of crimes is not apposite. Yet, there is some perspective to be gained.

Certainly, it cannot be argued that the enforcement of the criminal law was understood to be a "core function of the executive" in England at any time from 1607 to 1787. The function of prosecution — save with State trials (extraordinary cases, touching the interests of the political authorities) — was private, and responsibility diffused. Criminal prosecutions, growing out of the law of torts, were instituted by private parties in the name of the King, unless the Attorney General refused to permit a prosecution to go on. In this manner the Crown was spared the expense of a centrally directed professional prosecutorial corps. Langbein, *The Origin of Public Prosecution at Common Law*, AM. J. LEG. HIST. 313, 335 (1973).

Prosecution was, therefore, local — drawing upon knowledge of the community — and cheap. Even today in England, there is no central corps of prosecutors for the prosecution of serious crime in the Crown Court, but rather barristers are hired on an *ad hoc* basis to prosecute for the state.

As a result of the Marian statutes of the mid-Sixteenth Century, the Justices of the Peace, leading local gentry appointed by royal commission for each county, became back-up prosecutors — interstitial prosecutors filling the gaps in a system of citizen prosecutors with the power to gather evidence and to bind witnesses for trial before royal judges on periodic circuits. *Id.* at 313-337.

There is as well something to be learned from the manner in which the British government and its senior officials are presently investigated. Tribunals of Inquiry, a mechanism invented in 1921, are employed when there are serious allegations reflecting upon the government or its ministers. Ap-

pointed by the Home Secretary after Parliamentary authorization and chaired by a leading *jurist*, the Tribunals of Inquiry are fact-finding panels which receive and may compel testimony, evaluate credibility, and transmit findings to the government. The Tribunal of Inquiry is not a court of law because it does not draw ultimate conclusions, but simply reports the facts it finds, and has no formal sanctions available to it. Yet, it has virtually an adjudicatory function because its findings may leave the government little choice as to ultimate sanctions.

The Tribunals of Inquiry may offer the only method for authoritative determination of responsibility in the British system, the only method for responsible governmental reactions, and the only method for the re-establishment of confidence in the integrity of the government. Such tribunals have been used in modern times to investigate allegations that public officials had been bribed (Justice Lynsky Tribunal of Inquiry, 1948-49), and to investigate security leaks in the defense establishment (Radcliff Tribunal). In addition, in 1963, Lord Denning, acting without statutory powers, conducted a special inquiry into allegations that the Secretary of State for War had a personal relationship with a woman who in turn was involved with Soviet agents. F. MORRISON, COURTS AND THE POLITICAL PROCESS IN ENGLAND 174-183 (1973). It has been believed from the time of the creation of the Tribunals of Inquiry that without a judge of high standing as chairman the findings would not achieve the same measure of public confidence and acceptance. Great Britain, Royal Commission on Tribunals of Inquiry, *Report of the Royal Commission on Tribunals of Inquiry* 29-30 (1966).

The American Colonial Era

It can hardly be said that the power to direct prosecutions was a "core executive function" during the colonial era or in the years immediately after independence. While in America, unlike England, there were during that period public prosecutors — a combination of the English Attorney General and the French *avocat general* and *procureur du roi* — there was still no central direction of prosecution by the executive, and even as late as 1800, most prosecution in the states was conducted by private citizens. The prosecutive mechanism was adapted to a country of independent neighborhoods with local institutions, local offenders, and problems of local order and security. R. POUND, CRIMINAL JUSTICE IN AMERICA 151 (1930). In America, the Governor was more limited in his control over the Attorney General than over other appointive officials and the Attorney General, in turn, was limited in his influence over local prosecutors.

It must also be remembered that separation of powers was not the dominant theme for the organization of governments, either in colonial times or under the new state constitutions. In general, the Governor, Council and elected deputies together formed the legislature and shared many governmental tasks. Lower houses would appoint administrative officers and sometimes hear appeals.

Even after independence, merged functions remained. In New Hampshire, for example, the legislature awarded new trials after judgment four times from 1791 to 1817. Legislative appellate jurisdiction survived until 1857 in Rhode Island. The offices of Governor and Chancellor were the same for New Jersey until 1844. F.R. AUMANN, THE CHANGING AMERICAN LEGAL SYSTEM: SOME SELECTED PHASES 164-66 (1940). In the South Atlantic state constitutions, the doctrine of separation of powers was stated, but not established in practice. The legislative bodies were not only the dominant branch of government, but in many cases they also exercised administrative or executive functions. The legislatures appointed most of the officials in Virginia and the two Carolinas, including the Governor, judges, sheriffs, secretaries and the Attorney General. In Georgia, the legislature exercised the pardoning power. In Virginia, North Carolina and South Carolina, there was nothing in the Constitution which prevented the legislature from amending or revising the Constitution at will. F. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860 (1966).

Justice in the New Republic

The First Judiciary Act of 1789 created a decentralized system of federal criminal law enforcement.Congress conferred the power and the duty to institute prosecutions for federal offenses upon the U.S. District Attorney for each district. But the federal district attorney was *not* made part of any organized administrative system. Their constituency was local, and throughout American history United States Attorneys have been influenced more by their local political and legal communities and their own sense of professionalism than they have been from any central administrative authority.

In an earlier draft of the Judiciary Act, the appointment of the Attorney General was vested in the judiciary. In the final draft it was vested in the executive. Between these two drafts, Livingston wrote to Ellsworth, an author of the bill, that the Attorney General should be under the executive's control. Livingston's letter did not say that placement of the Attorney General elsewhere would be unconstitutional; the choice instead was apparently based on efficiency, since it was sensi-

ble to place the Attorney General, whose primary role was legal advisor to the President, within the executive branch. Livingston's letter makes no reference to how the Act should classify U.S. Attorneys, the real prosecutors at this time.[3]

In the absence of a Home Department, such supervision as was given to the federal attorneys came from the Department of State, although contacts between the attorneys and the State Department were apparently largely fortuitous. Unlike consuls abroad, the attorneys apparently received no standard instructions, nor did they render annual or other regular reports. L.D. WHITE, THE FEDERALISTS 406-08 (1948). However, the Comptroller of the Treasury was responsible for approving suits for monies accountable to the United States. Thus, the district attorneys became subject to the comptroller's instruction in these kind of cases. Later, they also received instructions from the Postmaster General.

The Attorney General had no office, no staff, not even stationery. L.D. WHITE, THE JEFFERSONIANS 337 (1951). Although the first incumbent, Edmund Randolph, made efforts to build his office into an embryonic department of law enforcement, and to concern himself with problems of judicial administration, he largely failed to carve out a role in these areas. He received no reports and was "in a curious way disconnected from the actual conduct" of the business of government. L.D. WHITE, THE FEDERALISTS 166 (1948). The Attorney General was the legal adviser of the President and department heads, and an agent to whom the Congress might turn for information and advice. L.D. WHITE, THE FEDERALISTS 164 (1951). Until Attorney General William Wirt put a stop to it around 1819, the Congress asked the incumbent for

[3]Robert Livingston to Oliver Ellsworth (June 26, 1789) (on file at Huntington Library, San Marino, Calif.)

opinions on all manners of bills and procedures, particularly in regard to their constitutionality. L. HUSTON, THE DEPARTMENT OF JUSTICE 8 (1967). In addition, of course, the Attorney General represented the United States before the Supreme Court.

The role of the Attorney General in law enforcement did not grow rapidly. As late as 1850 his staff numbered but four, none of whom was a legal assistant. The Civil War began the process of limitation upon the independence of the U.S. Attorneys. But not until the creation of the Department of Justice in 1870 was the Attorney General given authority over the U.S. Attorneys and the law offices of other departments. It was not until 1909 that control of federal prosecution by the Department of Justice became firmly established, even as a matter of formal organizational authority. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT [Wickersham Commission], *Report on Prosecution* 8-9 (1931).

Exposure of Major Scandals in the Federal Government

The first widespread series of scandals involving political corruption in the executive branch touching the presidency occurred during the era of Ulysses S. Grant. With the single exception — the conduct of the Secretary of the Treasury Benjamin Bristow — investigations of the scandals were not the product of the executive branch. Few prosecutions resulted, and many of the malefactors continued in executive office. Congress did, however, take action against some of its own members and impeached one Cabinet secretary.

The scandals included:

1. The Credit Mobilier, organized to finance railroad construction, was awarded lucrative but fraudulent government contracts. Exposure came at first fortuitously by way of a lawsuit and leak to the press, stimulating a House investigation. Legislators and other officials had been bribed through gifts of Credit Mobilier stock. Two members of the House were expelled and the reputations of seven other members of Congress were damaged. Two Vice Presidents of the United States who had served under Grant also were disgraced.

2. Corruption in the award of Indian trading posts reached the Secretary of War, William W. Belknap. Favorites of the administration were receiving $100,000 per year. Belknap resigned to avoid impeachment. He was, however, impeached, but missed conviction in the Senate by five votes.

3. Attorney General George H. Williams, who demonstrated no degree of vigor in investigating any of the scandals, mingled his own funds with the accounts of the Department of Justice, used men on the public payroll as servants, and permitted his wife to order an expensive carriage to be paid for out of the contingent funds of the department. These revelations did not deter Grant from appointing Williams Chief Justice to succeed Salmon P. Chase, although they did prevent Senate confirmation. Not only was Williams never prosecuted, but Grant permitted him to remain Attorney General for another eighteen months.

4. Secretary of the Navy George M. Robeson was exposed by a House committee as having deposited $300,000 beyond his apparent income over seven years

by reason of his connection with a contractor for his department. Impeachment was foreclosed by the Presidential election and Robeson was never prosecuted.

5. Secretary of the Treasury William A. Richardson was revealed by a House committee to have made a contract with a political favorite to require the assistance of the regular internal revenue staff in discovering delinquent taxpayers, then substituting himself for the government officials in suit for recovery, all for the purpose of diverting one-half of the amount collected out of the Treasury. The Assistant Secretary and Department Solicitor resigned, but Grant rewarded Richardson by appointing him to the Court of Claims.

6. Due to the efforts of Richardson's successor as Secretary of the Treasury, Benjamin H. Bristow, 230 indictments were secured for evasion of internal revenue taxes on distilleries. Revenue Collectors from all over the country were involved. So widely was the net flung that Bristow dared trust no one in his department except the Solicitor, Bluford Wilson, and evidence was initially secured with the assistance of three private citizens. Among those implicated in the Whiskey Ring was General Orville E. Babcock, Grant's private secretary. Grant attempted to impede the trial, approving a request that Babcock face a handpicked military tribunal. When that failed, Grant denied the use of plea bargaining and trades of immunity to obtain testimony against Babcock. Babcock was acquitted and Grant forced Bristow from the Cabinet and Wilson from his job. L.D. WHITE, THE REPUBLICAN ERA: 1869-1901, 367ff (1958); J. MANHEIM, DEJA VU: AMERICAN POLITICAL PROBLEMS IN HISTORICAL PERSPECTIVE 96-108 (1976).

Teapot Dome

The second widespread series of scandals was resolved through the employment of special prosecutors. While the episode is normally tagged with the name of an oil reserve located fifty miles north of Casper, Wyoming, another reserve, that in Elk Hills, California, was also involved. Authority over both was transferred from the Navy to the Interior Department after Warren Harding became President, and then the rights to develop the oil fields were secretly leased to private companies in return for payoffs. There were, as well, other scandals, unconnected to Teapot Dome, discovered contemporaneously in the Department of Justice, the Veterans' Bureau and the Office of Alien Property.

Allegations of graft and corruption in the Harding administration involving Secretary of the Interior Albert Fall began to circulate as early as April 1922. Neither the White House, the Justice Department, nor the Republican-controlled Congress demonstrated much interest in an investigation, which ultimately was spurred by Senator Thomas Walsh, a Montana Democrat.

No serious investigation of Teapot Dome took place until after Harding's death on August 2, 1923. Revelations before the Senate Committee on Public Lands and Surveys, led by Walsh, that Fall had twice perjured himself, led to calls for the appointment of outside counsel. The Department of Justice had been under considerable suspicion during the stewardship of Attorney General Harry M. Daugherty, a Harding crony, for delays and failure to obtain convictions in a number of prominent cases, for failure to enforce antitrust laws, for favoritism towards bankers, and even for collusion in the interstate transportation of boxing films. J. MANHEIM, DEJA VU: AMERICAN POLITICAL PROBLEMS IN HISTORICAL PERSPECTIVE 112 (1976).

Since Daugherty had evinced no interest in active investigation, Walsh advised Calvin Coolidge, who had succeeded Harding, to appoint special counsel to investigate and prosecute crimes arising out of the oil reserve leases. Coolidge announced that he would appoint two independent counsel, one from each party, with the consent of the Senate. While Coolidge's first two nominees were withdrawn, Atlee Pomerene, an Ohio Democrat, and Owen Roberts, a Philadelphia Republican, were then commissioned with unlimited authority to handle the prosecution of the oil leases. The day after Roberts' confirmation, Secretary of the Navy Edwin Denby resigned.

Meanwhile, Daugherty had refused to give the Senate committee certain papers in the Attorney General's office and the Senate passed a resolution initiating an investigation of the Attorney General. Coolidge then asked for Daugherty's resignation. Later it would be revealed that Daugherty had received payment from violators of the Prohibition statutes seeking to avoid prosecution, and that he had failed to prosecute graft in the Veteran's Bureau. He was ultimately tried in the Southern District of New York for conspiracy and acquitted.

Litigation by Special Counsel to set aside the leases was successful. Receiverships were established for the government to operate the wells. Roberts and Pomerene helped the District Attorney in Washington, D.C. to present evidence to the grand jury and eventually conducted the actual prosecution of criminal cases. Fall was convicted of accepting a bribe and sentenced to one year in prison and a $100,000 fine. Both Edward Doheny and Harry Sinclair, who controlled the oil companies and paid bribes, were acquitted. In all, special counsel litigated two civil suits, two contempt cases, and eight criminal trials over a period of six and one-half years. B. NOGGLE, TEAPOT DOME: OIL AND POLITICS IN THE 1920'S (1962); W.A. WHITE, A PURITAN IN BABYLON 271-272 (1939).

The Truman Administration Scandals

The second major attempt on the Federal level to use special counsel to investigate high-level corruption in the executive branch was less successful than the Teapot Dome episode. The administration of President Harry Truman was plagued by scandals, even though Truman himself was personally honest. Opportunities for private gain abounded, as they had in the 1920s, in an uncertain postwar economy, and expanding layers of bureaucracy shielded wrongdoers. Fiercely loyal to his associates and convinced that attacks on them were aimed at him, Truman relied more on his personal judgment of people than upon evidence that might have implicated them. As a result, the Truman administration was embarrassed by problems with the Reconstruction Finance Corporation; by charges of influence-peddling against his military aide and close friend, Harry Vaughan; and by accusations of the Department of Justice being sluggish in responding to charges of electoral fraud in Kansas City.

Perhaps the most serious scandal was the disclosure of corrupt activities in the Department of Internal Revenue, including tax fixing, embezzlement and extortion. Among those implicated were Assistant Attorney General T. Lamar Caudle, head of the Tax Division of the Department of Justice, and Charles Oliphant, Chief Counsel in the Bureau of Internal Revenue. The administration conducted a half-hearted investigation, but publicity from Congressional hearings led to the dismissal of Caudle and Oliphant.

Under heavy pressure from the Congress and from others in his party, Truman first sought to name a three-member committee to investigate the scandal, but then left the matter to his Attorney General, J. Howard McGrath, former Chairman of the Democratic Party. McGrath then named a New York attorney and Republican politician, Newbold Morris, as Special

Assistant to the Attorney General, but demonstrated little interest in providing Morris with staff. When McGrath blocked circulation of a detailed questionnaire (including a complete personal financial statement) to Justice Department officials, in apparent contradiction of an executive order, Morris fought back. McGrath fired Morris. Hours later, Truman forced McGrath's resignation. No additional misconduct was exposed, although the administration did effectively reorganize the Bureau of Internal Revenue. A.D. DUNAR, THE TRUMAN SCANDALS AND THE POLITICS OF MORALITY 96-120 (1984).

Congressional Contempt Power

In 1796, the House of Representatives tried, convicted and imprisoned a private citizen on charges of congressional bribery. (Moreland, *Cong. Investigation and Private Persons*, 40 S. Cal. L. Rev., 189,190-1 (1967). In 1827, the Supreme Court in *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, held that this power was inferred from the Constitution. In 1857, due to the unwieldy and time-consuming nature of contempt proceedings, Congress enacted legislation providing for executive prosecution of contumacious witnesses before Congress in the courts. Although it was not until recently that any high-ranking officials were held in contempt, Congress and the Department of Justice have recognized that this power might be used against executive officials. (*Cong. Globe*, 34th Cong., 3d Sess. 429 (1857) (remarks by Rep. H. Marshall); *The Petroleum Import Fee: Dept. of Energy Oversight*, Hearings Before the Subcommittee on the House Committee on Government Operations, 96th Cong., 2d Sess. 122 (1980) (testimony of Asst. Attorney General Hammond)). In 1927, the Supreme Court upheld the use of this power against the Attorney General's brother who had been subpoenaed as part of an investigation into whether the Department of Justice had properly handled

an antitrust investigation. *McGrain v. Daugherty*, 273 U.S. 135 (1927).

Experience of the States

Much illumination can be shed upon the federal problem by the extensive state experience in dealing with investigation and violation of criminal laws by officials, experience which demonstrates heavy reliance upon *ad hoc* special prosecutors, often court-appointed.

It should be pointed out that law enforcement is decentralized in the states. Governors often lack control of the State Attorney General, an elected official. In turn, the Attorney General has little authority over the local district attorneys, who also are usually elected.

Certainly, the problem of prosecutors with conflicts of interest is not a new one. State courts have appointed special prosecutors where the District Attorney is suspected of a crime; where the District Attorney has a personal relationship with the target of the investigation; and where the District Attorney is unable to impartially prosecute because of an institutional relationship with the accused. Convictions won by such special prosecutors have been uniformly upheld against separation of powers attack. Often the appointment of the special prosecutor is authorized by statute — thirty-two states authorized appointment by the trial courts of general jurisdiction in 1974 — but in a substantial number, state courts have also claimed inherent power to appoint a *pro tem* prosecutor. See Dingman and Meiselman, *The Federal Special Prosecutor Act of 1974*, in *Removing Politics from the Administration of Justice*, Hearings on S. 2803 and S. 2978 before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 93d Cong., 2d Sess. 351, 352, 362 (1974). The

Supreme Court of Idaho vigorously held that "it would be his [the trial judge's] bounden duty" to appoint an attorney to act in place of the district attorney where the trial judge knows or believes that there have been offenses/conduct in the administration of justice in which the district attorney is or may be involved. The Court continued:

> Reason dictates and simple justice demands that no official or individual can take part in an investigation before a grand jury, the result of which may affect him.

People ex rel *Lindsley* v. *District Court of Second Judicial District*, 29 Colo.5 (1901). The Oklahoma Criminal Court of Appeals called the power to appoint such officers "necessary for the protection and existence of the court and absolutely essential to the administration of justice and the enforcement of all our laws." It continued that it would be "an indefensible reproach upon our institutions if crimes should go unpunished for want of power in a court of general jurisdiction to appoint some one to supply the place of the regular elected officer when absent from the court or disqualified to act." *Lizar* v. *State*, 166 P.2d 119 (1946).

The New York State Experience

Experiences in one state, New York, demonstrate the critical role of special counsel in assisting all three branches in conducting investigations, and in assisting the executive and the courts in prosecutions.

Boss Tweed

Following extensive press attention in the summer of 1871 and mobilization of reform members of the bar, Charles

O'Conor was appointed special state attorney general to commence civil suits against Boss Tweed to recover stolen funds. Samuel J. Tilden, on behalf of a citizen's committee, swore out a warrant for Tweed's arrest. In Tweed's criminal trial, the local district attorney was "assisted" by two lawyers representing Special State Attorney General O'Conor. In fact, they conducted the case. Tweed was convicted of 102 offenses. In the civil suit, tried by O'Conor, the jury brought in a verdict against Tweed for over six million dollars.

In addition, information on the judges corrupted by the Tweed ring among others was gathered by a committee of the Association of the Bar of the City of New York and given to the New York Assembly. At hearings of the Assembly Judiciary Committee, the Association of the Bar was represented by three members. In an impeachment proceeeding, members of the Association were employed by the Assembly. G. MARTIN, CAUSES AND CONFLICTS 65-119 (1970).

The Seabury Investigations

One of the most notable examples of the use of special counsel to root out municipal corruption in American history were the efforts of Samuel Seabury, who from 1930 to 1932 was engaged in investigations for all three branches of New York State government.

In the fall of 1930, Governor Franklin D. Roosevelt, under considerable public pressure, called for an extraordinary term of the New York State Supreme Court to investigate the Magistrates' courts in the Bronx. The Court designated Seabury as referee (investigating counsel). During eight months of public hearings 291 witnesses were examined. At first exposing a racket in which women were framed as prostitutes by police, bondsmen, lawyers, court clerks and magistrates, Seabury

used the hearings to demonstrate how Tammany district leaders interceded with the magistrates for favors. Two magistrates were removed from the bench in proceedings in which Seabury participated. Three more resigned and sixteen lawyers were disbarred.

While the magistrates' investigation was progressing, Governor Roosevelt in March 1931 appointed Seabury as commissioner to investigate and report on charges filed against the New York County District Attorney, Thomas C.T. Train, who had never acted to uncover the crimes and misfeasance Seabury was exposing. Seabury eventually reported that evidence was insufficient to warrant Train's removal, but the investigation revealed that there were very few businesses in the city that were not the prey of racketeers seeking bribes, payoffs and shakedowns.

Then, in April 1931, a committee of the New York State Legislature appointed Seabury as its counsel to investigate New York City government. These thorough investigations uncovered bank accounts running into millions of dollars, held by city officials on salary. Seabury traced the framework of corruption through all five boroughs of the city and revealed that the Manhattan Tammany leaders received a cut from almost every conceivable governmental function. The investigations led to the removal of the Sheriff of New York county, who had accumulated nearly $400,000 within six years on an annual salary of $8,500 (which he ascribed to a magical "tin box").

By the time the investigation reached the door of the City's popular mayor, Jimmy Walker, Governor Roosevelt, who was then seeking the Democratic Presidential nomination, procrastinated. Seabury recommended Walker's removal from office and kept the pressure on Roosevelt, who was able

to delay until after the Democratic convention the hearing which would lead to the Mayor's resignation. H. MITGANG, THE MAN WHO RODE THE TIGER 159-310 (1963); G. MARTIN, CAUSES AND CONFLICTS 227ff (1970).

Dewey as Special Prosecutor

In 1935 a grand jury, seeking to attack racketeering and civic corruption, revolted against the Tammany District Attorney of New York County, William Copeland Dodge, finally prohibiting Dodge and his assistants from conducting the grand jury proceedings. After subpoenaing witnesses on its own, the grand jury demanded that Dodge appoint a Special Prosecutor of their choice. Dodge agreed in principle, but refused to choose any of the six names the jury gave to him. The grand jury then called for a special term of the city's Supreme Court to hear evidence and vote indictments and for a Special Prosecutor appointed by Governor Lehman, who agreed reluctantly to the request, and appointed Dewey, a potential political rival.

Technically, Dewey was Deputy Assistant District Attorney under Dodge, but he assembled a brilliant staff including Murray I. Gurfein, Stanley H. Fuld, Charles Breitel, Edward McLean, William B. Herlands, and Frank Hogan. Dewey brought a frontal attack on organized crime, including all forms of racketeering, bail bonding, and political protection. Thirty-six loan sharks were convicted.

Then Dewey turned his attention to racketeering in prostitution. The notorious Lucky Luciano was sentenced to thirty to fifty years for that crime. Finally, Dewey turned to the industrial rackets — extortion in the garment industry, the bakery industry, the poultry and poultry trucking industry. Over and over the same pattern was repeated: books were

seized in a raid; tax evasion threatened; victims convinced to talk; convictions obtained. R.N. SMITH, THOMAS E. DEWEY AND HIS TIMES 147-226 (1982); T.E. DEWEY, TWENTY AGAINST THE UNDERWORLD 149ff (1974).

Special Prosecutors of the Early 1970s

In two highly celebrated instances in the early 1970s special prosecutors were employed in New York State — one for fact-finding and one for prosecution.

Two days after the end of a prison riot in Attica, N.Y., Governor Nelson Rockefeller and the leaders of the state legislature asked Chief Judge Stanley H. Fuld of the New York Court of Appeals and the four presiding justices of the Appellate Division to appoint a citizens' commission to investigate facts leading up to, during, and following the riots. At the time, jursdiction over the criminal aspects of the uprising was left to the Deputy Attorney General, but a special prosecutor was ultimately employed at the recommendation of the Commission, which was chaired by New York University School of Law Dean Robert McKay. THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA xxiii-xxiv (1972).

In 1972 Governor Rockefeller appointed Maurice H. Nadjari Special Prosecutor to investigate corruption in the New York City criminal justice system, superseding New York City's five district attorneys on matters relating to corruption. Rockefeller stated that:

> Under the present circumstances only an independent agency with citywide authority, assigned a clear and specific mission and armed with full prosecutorial power and independent investigative capacity can break through the natural resistance of government

agencies to investigate themselves or their close allies.

Nadjari, *New York State's Office of the Special Prosecutor: A Creation Born of Necessity*, 2 HOFSTRA L. REV. 97,102 (1974).

CONCLUSION

Review of the historical record shows that the investigation and prosecution of criminal offenses has never been an exclusive function of the executive. The authority to appoint a special prosecutor has shifted to meet the necessities of each situation and in particular the special problem of conflict of interest in the executive branch. In some cases the appointment has been by the executive; in others by the legislature; in others by the courts — in the case of Samuel Seabury, by *all three*. The method of appointment provided for under the present Independent Counsel statute has a respectable lineage for which no one need apologize, and one which cannot properly be characterized as inconsistent with our constitutional heritage.